No. 1013

(19)

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IN THE
Supreme Court of the United States
WASHINGTON, D. C.

OCTOBER TERM, 1945

DR. WILLIAM HOWARD HAY FOUNDATION, INC.,
PETITIONER,

vs.

SAFETY HARBOR SANATORIUM, INC.,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE JUDGES OF THE SUPREME COURT OF THE UNITED STATES:

Comes the DR. WILLIAM HOWARD HAY FOUNDATION, INC., by its president, R. Wilson Evans, and requests the review of the above case for the following causes and reasons:

FIRST

The review is asked of the decision of the U. S. Circuit Court of Appeals, Fifth Circuit, New Orleans, of November 16, 1944, which was an appeal from the judgment of the trial court, U. S. District Court for the Southern District of Florida, of January 9, 1943, and denial of new trial of February 16, 1943.

SECOND

The jurisdiction of this Court is found in Judicial Code 240 as amended by Acts of February 13, 1925, 43, Statutes 938 U.S.C.A., Title 28, Vol. 4, 347, which provides:

> "Certiorari to Circuit Court of Appeals and Court of Appeals of District of Columbia in any case, civil or criminal, in the Circuit Court of Appeals or in the Court of Appeals of the District of Columbia shall be competent for the Supreme Court of the United States upon petition of any party thereto, whether government or other litigant, to require by Certiorari either before or after a judgment or decree by such lower court that the case be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the case had been brought there by unrestricted writ of error or appeal."

THIRD

The Petitioner, a scientific, educational charitable, non-profit foundation, is the owner of the trademark and trade name, "Hay System, Hay Diets". They own it by assignment in writing from the founder and owner, Dr. William Howard Hay, who founded and built it up over a period of thirty years. The name is internationally known and of great value, and was assigned to the Petitioner perpetually to carry on the work of Dr. Hay, before and after his death. (Refer to Exhibit "A" 21, page 15 of the Transcript of Record in case No. 10664, U.S.C.C.A., Fifth Circuit.)

The Respondent, who has infringed and used unfair trade practices and fraud, is a commercial concern for profit, formed in 1936, and has, and is reaping great benefits from the use of Petitioner's name and trade-

mark. (Refer to pages 37 to 55 inclusive of Transcript of Record, Case No. 10,664, U.S.C.C.A., Fifth Circuit).

FOURTH

The trial court heard eleven witnesses (refer to pages 149 to 197 inclusive of Transcript of Record, Case No. 10,664 U.S.C.C.A., Fifth Circuit), covering evidence, and admitted thirty-six exhibitts in evidence (refer to pages 37 to 55 inclusive of Transcript of Record, Case No. 10,664, U.S.C.C.A., Fifth Circuit).

Defendant offered no evidence and no exhibits. Trial court refused a trial by jury, although Plaintiff asked for one.

FIFTH

Trial court gave directed verdict to Defendant and stated that Plaintiff had proved he had no jurisdiction, dismissed the case, and then two days later gave findings of fact and conclusions of law contrary to evidence submitted: (See page 85 Transcript of Record, U.S.C.-C.A. No. 10,664, Fifth Circuit).

> "Plaintiff has failed to prove that the amount in controversy in this cause is more than $3,000 exclusive of interest and costs, and has failed to prove the jurisdiction of this court over the subject matter of the controversy."

SIXTH

The case is one involving:

(a) Infringement of trademark and name, unfair trade practices and fraud.

(b) The protection under the common law of a trademark and name built up over thirty years.

(c) The denial of constitutional rights to Plaintiff by refusal of trial by jury.

(d) The infringement of trademark and name of a non-profit, educational, scientific, charitable foundation by a commercial concern who have and are reaping large profits by its use, to the damage of Petitioner, and perpetration of fraud upon tthe public.

JURISDICTION OF TRIAL-COURT

SEVENTH

The question is whether:

(a) A new commercial, profit corporation can infringe and take the name of a charitable, educational, scientific, non-profit foundation which has been built up over a period of thirty years, and use it for large gains and profits, and also perpetrating fraud upon the public in doing so;

(b) Will the constitution permit a judgment to stand which has been determined without and by the refusal of the trial court of a trial by jury? We quote from Constitutional Limitations by Cooley, Vol. 2, page 2:

> "A constitutional provision is that the right of a trial by jury shall be secured to all and remain inviolate forever. Party is entitled to examine into qualifications and impartiality of jurors and to have the proceedings published and no condition should be imposed upon the exercise of the right that shall impart value and usefulness. The trial court is never authorized to take a case from the jury where there is legitimate evidence tending to prove the cause of action."

(c) Will the constitution uphold and protect a trademark and trade name under the common law, especially such trademark as owned by a scientific, educational, charitable, non-profit foundation?

EIGHTH

The trial court committed many errors (Ref. pages 86-88 inclusive, Transcript of Record, U.S.C.C.A., Fifth Circuit, Case No. 10,664, under "Motion for New Trial"), and refused a new trial. Petitioner's appeal covers many errors (Ref. pages 197-198 of Record.)

NINTH

The U. S. Circuit Court of Appeals affirmed the decision of the trial court (see copy attached) but gave its decision:

> "Judgment is therefore affirmed, but of course without prejudices to Plaintiff's right to sue Defendant with respect to any conduct occurring subsequent to the judgment in this suit which Plaintiff believes it to damages or injunction."

We call the Court's attention to the case of *LeCroix* vs. *May,* 15 Federal 236. Here the right of party in a trademark is a common law right, recognized and preserved by the trademark Act of Congress.

In the case of *Menendez* vs. *Holt,* 128 U.S. 514, the opinion of Chief Justice Fuller:

> "The intentional use of another's trademark is a fraud, and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent, and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked."

In the case of *McLean* vs. *Fleming,* 96 U.S. 245, we quote Justice Clifford:

> "Positive proof of fraudulent intent is not required where the proof of infringement is clear, as the liability of the infringer arises from the fact that he is enabled through the unwarranted use."

In the case of *Jacobs* vs. *Beacham,* 221 U.S. 263.

> Justice Holmes Quote: "When the defendant has to justify using the plaintiff's trade name the burden is on him. Finally as the case presents what is fraud on its face it is more likely that the defendant is a modern advertiser than that he has discovered the hidden formulae of the plaintiff's success. To call Beacham's Pills is to call them Plaintiff's pills. The statement that the defendant makes them does not save the fraud. That is not what the public would notice or is intended to notice and if it did its natural interpretation would be that the defendant bought out the original business and was carrying it on."

TENTH

The District Court was reversible by the U.S.C.C.A., Fifth Circuit, and we refer this Honorable Court to *Chicago Alton Railroad* vs. *Pressed Steel Car Company,* 243 Federal 883, C.C.A., Illinois:

> "The general finding on an issue of infringement in an action at law tried by the court without jury, held reversible by appellate court."

Further, *Wolf Mineral Process Co.* vs. *Mineral Process Co.,* 18 Federal 2nd 483:

> "Findings of fact by trial court in equity cases are not conclusive on appellate court."

ELEVENTH

Judisdiction and other questions may be decided by the C.C.A., and reference is made to *Rust* vs. *United Water Works Co.,* 70 Federal 129:

> "Where judgment involves both question of jurisdiction and other questions and is taken in error to C.C.A. on whole case, that court may determine the jurisdiction of the court below, as well as other questions."

TWELFTH

Another reason for this Writ is: to receive uniformity of decisions among the Circuit Courts of Appeals. The decision of the Circuit Court of Appeals, Fifth Circuit, is not in conformity with other Circuit Courts of Appeals of other Circuits on similar questions of law.

Ref.: *duPont Cellophane Co., Inc.* v. *Wax Products Co., Inc.,* C.C.A. 2nd Circuit. Trial court held it had infringed, and awarded damages, affirmed by the C.C.A., 2nd Circuit.

John B. Stetson Co. v. *Stephen L. Stetson Co., Ltd.* 85 Fed. 2d 586. Affirmed by C.C.A., 2d Circuit. Trade mark protected.

R. H. Macy Co., Inc. v. *Macy Drugstores, Inc.,* 84 Fed. 2d 387. Permanent injunction granted by C.C.A. 3rd Circuit.

Axton Fisher Tobacco Co. v. *Fortune Tobacco* Co., 82 Fed. 2d 295. "20 Grand" trade mark upheld after eight months use.

Motor Improvement Co., Inc. v. *A. C. Spark Plug Co.,* Trade mark protected by C.C.A. 6th Circuit.

Mantle Lamp Co. of America v. *Aladdin Mfg. Co.*, 78 Fed. 2d 426. District Court reversed, and the trade mark protected by C.C.A. 7th Circuit.

THIRTEENTH

Errors of The United States Circuit Court of Appeals, Fifth Circuit:

See Appellants Petition for rehearing attached to Typewritten Statement Filed in this court, and a copy of same also certified by the U.S.C.C.A., Fifth Circuit, as part of record in that court. See also copy of Appellant's Brief attached to the typewritten statement and also a part of the record of the U.S.C.C.A.

THEREFORE, Petitioner believes that this court has jurisdiction of this matter of giving constitutional protection to the Petitioner, an educational, scientific, charitable, non-profit foundation, of their trade name and trademark, and preventing the trade name from being filched away by a new commercial concern which has no right to use it and is profiting by a large income from the use of the name. Petitioner verily believes that the trial court did not use discretion in its judgment, and the U.S.C.C.A. has abused its powers in not reversing the judgment of the lower court.

The question involved in this case is one of federal law which has not been, and should be, settled by this court.

Petitioner therefore believes that this court has jurisdiction and power to reverse the judgment of the courts below and give the protection of the common law to the Appellant on his trademark and name, and that this court has power to reverse the decision of the courts below on the unconstitutionality of the denial of

right of trial by jury, denied the Petitioner in the court below.

THEREFORE, this Petitioner prays that this Honorable Court will give due consideration to this Writ of Certiorari and will review the record from the U.S.C.C.A. and the trial court.

Respectfully submitted,

DR. WILLIAM HOWARD HAY FOUNDATION, INC.

By R. Wilson Evans, *President.*

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St. Petersburg, Florida.